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In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICI CURIAE OF MANUFACTURED HOUSING INSTITUTE AND NEW JERSEY MANUFACTURED HOUSING ASSOCIATION IN SUPPORT OF PETITION

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Manufactured Housing Institute (MHI) and New Jersey Manufactured Housing Association (NJMHA) submit this brief, with consent of the respondent and the petitioner, as amici curiae in support of the petition for a writ of certiorari to the Supreme Court of New Jersey.

STATEMENT OF INTEREST

At issue in this case are the proper limits of municipal behavior and the Court's role in establishing and maintaining those limits. The abuse of power by governmental officials, particularly, as is the case here, where an entire municipal body authorized the abuse, is an issue of great public importance. This case arises from an activity that occurs thousands of times each year throughout the country, that is, a decision by a rent leveling board. However, in this case, one board member adopted a hostile and plainly biased attitude towards petitioners and further introduced facts from outside the record. During the hearings, petitioners made several applications to the Board to remove this board member from the proceedings. These applications were repeatedly denied. Condoning a board member's berating of an applicant and the board's reliance on that member's unsubstantiated allegations violate the canons of decency and fairness that our system regards as fundamental. The ramifications of this decision on manufactured housing throughout the nation amount to a denial of fundamental rights. Thus, the decision has far reaching impact on manufactured housing, an important affordable housing source in New Jersey and throughout the country. This case will also have an impact on the behavior of municipal boards beyond the rent control context. As such, this case presents special circumstances that must be settled by this Court.

MHI is a non-profit Illinois trade association headquartered in Arlington, Virginia, which represents all aspects of the

manufactured housing industry: community owners, manufacturers, suppliers, retailers, lenders, state manufactured housing associations, and private third party inspection agencies. MHI represents 48 affiliated state associations and its membership produces approximately seventy percent of the total production of the industry. NJMHA is a state association member of MHI and the petitioners are members of NJMHA. Petitioner David Rivkin is both a member of NJMHA and a certified representative member of MHI. MHI is submitting this brief because of its concern that the New Jersey Supreme Court decision will result in unchecked abuses of municipal power, which will adversely affect the manufactured housing industry.

NJMHA is a non-profit trade organization comprised of in excess of 200 members. The NJMHA members include manufactured housing community owners, operators, suppliers, consultants and other individuals who are involved in the various facets of the manufactured housing industry in New Jersey. Of the over 200 members, approximately 165 are owners or operators of manufactured housing communities in New Jersey. Currently, there are approximately 250 manufactured housing communities in New Jersey.

Based on available information, a large number of mobilehome park communities are subject to rent control. The operations of manufactured housing communities throughout the country play a unique role in meeting housing needs and provide an opportunity for many citizens who would otherwise be unable to afford home ownership. Manufactured housing provides the least cost nonsubsidized housing alternative in the country. NJMHA and MHI and their individual members are directly affected by the outcome of this case and, in particular, the social and economic consequences of the decision.

This case provides the Court with a chance to define the

parameters of acceptable behavior on the part of public officials. The Court is provided with an opportunity to issue a mandate that the abuse of power by municipal representatives is unacceptable and that individuals who are subject to such abuse will not be deprived of their constitutional rights and left without an adequate remedy. There are several factors that make this case so critical. First, the behavior of the individual board member and the acceptance of that behavior by the entire board must be addressed and curtailed. When the record is reviewed, it becomes clear that it is of vital importance for the Court to address the constitutional implications of this deliberately biased municipal action. Second, the position taken by the New Jersey Supreme Court is inconsistent with other jurisdictions. Third, constitutional protections must apply when local officials act with total contempt for an applicant's basic rights and the notions of fundamental fairness. The standard for that constitutional protection is a standard that must be clearly defined and articulated. Fourth, the sanctioning of the conduct by the board and the board's failure to disqualify the member leave applicants at risk that this type of incident will be repeated and that the applicant will be dependent on the individual member's decision-making abilities. The scope of the impact of this decision cannot be underestimated.

SUMMARY OF THE ARGUMENT

Rule 10(b) provides that certiorari will be granted where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or the United States Court of Appeals. Those criteria are clearly met in this case. A writ of certiorari pursuant to Rule 10(b) is therefore appropriate.

Uncertainty as to the availability of 1983 remedies affects property rights on all levels. The record in this case does not

support a finding that a mere procedural error occurred. It has been established that there are substantive, as well as procedural due process violations at issue. These substantive due process violations need to be addressed. An action in lieu of prerogative writs does not provide an adequate postdeprivation remedy where there has been a denial of substantive due process rights.

This case presents an opportunity for the Court to establish guidelines under which responsible decision-making must take place. A municipality must be held to an established standard of conduct. In this case, not only did the individual board member openly acknowledge that he was acting outside his role, but also, the board as a whole was aware of the improper behavior and allowed it to continue. The inappropriate conduct was authorized. Substantive due process violations in this context have far reaching social implications. Thus, a reversal of the New Jersey Supreme Court's decision will address this type of violation.

This Court's recognition of the existence of egregious behavior in this matter will not result in an abuse of the system or an unwillingness of people to serve as volunteers on the municipal level or the assertion of inappropriate civil rights litigation. Instead, review by this Court will satisfy the constitutional guarantees and uphold this Court's ongoing role to provide guidelines on the parameters of acceptable state action.

The State must be held accountable for its actions that cause a deprivation of due process rights. The New Jersey Supreme Court recognized the vital importance of this concept when it agreed to review whether or not an applicant appearing before a local rent leveling board may claim an unconstitutional deprivation of property and thus, collect damages when a member of a local board acts in a biased manner and that behavior

is accepted by the board. Following review, the New Jersey Supreme Court established a standard of "egregious misconduct that shocks the conscience, violates civilized norms of governance, or constitutes invidious discrimination on the part of a board member or board." This standard does not allow for redress by an applicant against the inappropriate actions of a board member except in very rare circumstances and should be overturned.

Further, the New Jersey Supreme Court inappropriately applied the *Parrat* analysis to this case: (1) *Parrat v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 680 L. Ed. 2d 420 (1981) does not apply to cases where the aggrieved parties have established substantive as well as procedural due process violations by governmental officials; (2) the *Parrat* analysis does not apply to the conduct of a rent leveling board that was not "random and unauthorized," but was readily foreseeable and could have been remedied; and (3) where aggrieved parties do not have adequate postdeprivation remedies, the State should be held accountable for its actions that cause deprivation of due process rights. For these reasons, the decision of the New Jersey Supreme Court in this case must be reversed.

ARGUMENT

I.

THE STATE MUST BE HELD ACCOUNTABLE FOR ITS ACTIONS THAT CAUSE A DEPRIVATION OF DUE PROCESS RIGHTS.

In its February 29, 1996 decision in this case, the New Jersey Supreme Court explained that the Due Process Clause is the source of three different kinds of constitutional protection:

> First, it incorporates specific protections defined in the bill of rights . . . Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process" [under which the state may not] take property without providing appropriate procedural safeguards.

Daniels v. Williams, 474 U.S. 327, 337, 106 S. Ct. 662, 677-678, 88 L. Ed. 2d 662, 672 (1986) (Stevens, J. concurring, citations and footnotes omitted).

The New Jersey Supreme Court found that the substantive due process doctrine "does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir.) (quotation and citations omitted), *cert.*

granted, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), and *cert. dismissed* 503 U.S. 257, 112 S.Ct. 1151, 117 L. Ed. 2d 400 (1992). Rather, "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . traditional notions of fairness . . . [and that are] offensive to human dignity.' " *Rivkin v. Dover Township Rent Leveling Board* (*Rivkin*) at page 15; *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989). The New Jersey Supreme Court also explained that the "conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards." (*Rivkin* at page 15); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir.) (determining that substantive due process rights may be violated when a municipal council arbitrarily and irrationally interferes with building permit process), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 and *cert. denied*, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) ("Arbitrariness, abuse of discretion, caprice or unfairness giv[e] rise to a constitutional claim [of denial of substantive due process in state permit processing actions]").

The state action that forms the basis for petitioners' contentions in this case was not only arbitrary, capricious and unreasonable, but openly and fervently biased against the applicant. Any attempt to minimize the actions of the board and the constitutional deprivation at issue in the case subverts the very purpose of the protections provided by the Constitution. No party has asserted that the Court should encourage inappropriate claims against municipal officials or municipal bodies. No party has asserted that inappropriate civil rights litigation should be

condoned. However, municipal behavior that is openly and fervently biased must be curtailed.

There is no disagreement that the Constitution provides a right to an adequate remedy. However, an action in lieu of prerogative writ is not an adequate remedy when substantive due process rights have been violated. Issues relating to the parameters of acceptable behavior by public officials and the abuse of power by government officials are issues of great public importance. Where aggrieved parties do not have adequate postdeprivation remedies, the State should be held accountable for its actions that caused the deprivation of due process rights. This is a case of substantive as well as procedural due process violations.

The New Jersey Supreme Court agreed to review whether or not an applicant appearing before a local rent leveling board may claim an unconstitutional deprivation of property and thus, collect damages when a member of the local board acts in a biased manner and is not disqualified. Following that review, the New Jersey Supreme Court established a standard of "egregious misconduct" that shocks the conscience, violates civilized norms of governance, or constitutes invidious discrimination on the part of a board member or board. This standard is overly restrictive and contrary to a more expansive interpretation given the Due Process Clause by many current court decisions.

This conflict was noted by the New Jersey Supreme Court in its decision. Further, the importance of this case and the need for the Court's supervision is set forth in the conflicting interpretations expressed in other court opinions.

In federal court, in order to maintain an action for a substantive due process violation, the plaintiff must prove that the regulation or decision was "arbitrary or irrational." *See, e.g.*,

DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 593 (3rd Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995). In state court, however, the plaintiff must prove that such a decision was "arbitrary, capricious and unreasonable." However, the New Jersey Supreme Court confused the arbitrary and capricious standard for overturning board decisions with the analysis utilized by federal courts. The New Jersey Supreme Court inappropriately viewed the arbitrary and capricious standard as merely a term of art relating to a failure of a local agency to follow a necessary standard in its decision making, instead of the analysis used by the federal courts involving that "egregious governmental abuse against liberty or property [that] deprives one of its substantive due process rights."

In this decision, the New Jersey Supreme Court rejects the "arbitrary and irrational" standard utilized by many Federal Court opinions to find substantive due process violations. *See, e.g., DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592. At the same time, New Jersey confused the federal "arbitrary and irrational" standard with New Jersey's standard in agency review cases, which requires analysis in terms of arbitrary, capricious and unreasonable behavior. That standard requires challenges to agency action to demonstrate that the action was not based on "substantial evidence" in the record made before that agency. In this case, the court inappropriately applied the more stringent standard under the misunderstanding that substantive due process protection should be reserved for only "truly irrational" government abuses. Instead, the New Jersey Supreme Court should have equated "truly irrational" governmental abuse with that conduct that bears no relationship to the merits of the pending matter.

The standard imposed by the New Jersey Supreme Court does not allow for redress by an applicant against the inappropriate actions of a board member and must be overturned.

II.

PARRAT IS INAPPLICABLE TO CASES WHERE THERE ARE SUBSTANTIVE AS WELL AS PROCEDURAL DUE PROCESS VIOLATIONS AND *PARRAT* WAS APPLIED INCORRECTLY TO THIS CASE.

A. *Parrat* is inapplicable to cases such as petitioners' where the aggrieved parties have established substantive as well as procedural due process violations by governmental officials.

The New Jersey Supreme Court erred in its application of *Parrat, supra,* to the case at bar. *Parrat* is inapplicable to cases such as petitioners' where there are contentions of substantive as well as procedural due process violations. Petitioners assert that both their procedural and substantive due process rights have been violated. Thus, both the substantive due process violations and the procedural due process violations must be addressed.

The New Jersey Supreme Court's inaccurate identification of the nature of the constitutional violations at issue led to its erroneous affirmation of the Appellate Division. The New Jersey Supreme Court's decision ultimately relied upon *Parrat, supra,* in its application to the facts of this case. In *Parrat,* the Court found that a prisoner did not have a cause of action under 42 U.S.C. § 1983 based on his allegations that prison officials had negligently misplaced a $23.50 hobby kit the prisoner ordered by mail since the officials did not provide a hearing prior to the deprivation. No assertion was made in *Parrat* that the procedure was infirm. The Court analyzed the claim in terms of the prerequisites for a successful Section 1983 claim but only dealt with issues regarding the absence of a predeprivation hearing in terms of procedural due process. Ultimately, *Parrat* concluded that a postdeprivation hearing may be constitutionally sufficient in cases where (1) prompt state action is a necessity, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S. Ct.

101 (1908) (in which contaminated food was seized to protect the public health); *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1552 (1947) (in which bank operations were seized because of allegations of bank mismanagement); or (2) a predeprivation hearing is impractical such as in the case of negligence by public employees; and (3) when an "adequate" postdeprivation procedure is provided. *Parrat, supra* at 430-431.

In *Parrat*, the Court explained that it was impossible to predict that a prison employee would negligently destroy a hobby kit; further there was a state tort claim procedure available for the prisoner to recover the value of his lost property. *Parrat, supra* at 432-433. The Third Circuit has since approved the view that *Parrat* cannot be read to make a section 1983 action resembling a tort suit disappear into thin air. *Berlanti v. Bodman*, 780 F.2d 296, 302 (3rd Cir. 1985) citing *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984). The *Parrat* case applies only when the plaintiff alleges a deprivation of procedural due process. The *Parrat* analysis is inapposite when the petitioner has alleged violations of substantive constitutional prescriptions.

Further, *Parrat* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible. *Augustine* at 329; *Berlanti* at 302. That is not the case here. The hearing that took place before the board provided evidence of the deprivation before a decision was issued.

Petitioners, and other similarly situated members of manufactured housing communities nationwide, ". . . may maintain a claim of substantive due process violation upon allegations that the government deliberately and arbitrarily abused its power." *Bello v. Walker*, 840 F.2d 1124, 1128-1129 (3rd Cir.), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 (1988). When the actions of a rent leveling board, a

governmental body, ". . . are motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the . . . application . . ." courts have found that a substantive due process violation has occurred. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991).

It is clear that where the conduct of a state employee is outrageous, abusive and thoroughly "shocks the conscience," then it will rise to the level of a substantive due process violation. *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952). It is well established that substantive due process violations are founded in "canons of decency and fairness which express notions of justice . . . so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . do more than offend some fastidious squeamishness of private sentimentality . . . [T]his is conduct that shocks the conscious." *Id.* The ramifications of this decision on manufactured housing throughout the nation amount to a denial of fundamental rights.

Where a state board takes no action to halt or prevent the ongoing deprivation of due process rights, it is deemed to have knowledge of and constructively acquiesce in the constitutional deprivation. *Salerno v. O'Rourke*, 555 F. Supp. 750, 756 (D. N.J. 1983); *The Skydiving Center of Greater Washington, D.C., Inc. v. St. Mary's County Airport Commission*, 823 F. Supp. 1273 (D. Md. 1993) (wherein the court found that the county commissioner was deemed to have authorized the actions of the airport commission, a subordinate agency, when the airport commission passed a ban on skydiving without affording plaintiffs an opportunity to be heard). It is appropriate for this Court to enforce limits on acceptable governmental behavior. In cases where the state board is well aware of the deprivation in advance and as it took place, it cannot later assert that the acts were unauthorized. This is especially true where the aggrieved

parties repeatedly asked the board to correct the wrong before it was complete and the board neither disapproves the wrong nor takes action to halt its effect.

There are at least 100 manufactured housing communities in New Jersey and hundreds more nationwide that are subject to rent control. Manufactured housing provides one of the few remaining sources of affordable housing in this country. Cost control is critical in maintaining the viability of this housing source. Community owners and operators need to know that there are guidelines, which define the acceptable limits of behavior, under which municipal boards can act. Municipalities also need to be provided with a standard of conduct. This Court must establish guidelines for the appropriate standard of conduct and further provide a remedy when those guidelines are not followed.

B. The conduct of the rent leveling board was not "random and unauthorized," but was readily foreseeable and could have been remedied. Therefore, the *Parrat* analysis does not apply.

Where a state board acts in a way that is not "random and unauthorized" but is foreseeable and consistent throughout the process, it can be and should be remedied in order to guarantee those appearing before the board their rights guaranteed by the constitution. At least 100 manufactured housing communities in New Jersey and hundreds more nationwide are subject to rent control. The owners and operators of these communities have fundamental constitutional rights that must be protected.

In the *Parrat* case, the acts of the prison officials in negligently disposing of the plaintiff's hobby kit were random and unauthorized; as such, the Court explained there was no way the state could have provided predeprivation hearings since it was impossible to predict such acts and institute procedures to

accommodate them. *Parrat*, 451 U.S. at 541, 101 S. Ct. at 1916. Therefore, no action can lie where the state then provides adequate postdeprivation procedures whereby the victim has an opportunity to be heard "at a meaningful time and in a meaningful manner." *Parrat*, 451 U.S. at 540, 101 S. Ct. at 1915.

Where the actions of a board member can be anticipated by a pattern of behavior throughout deliberations, the conduct should be and can be remedied prior to a final determination of the aggrieved parties' applications. Where the remedy is available and not provided, the conduct becomes ratified as state action. As such, the deprivation of rights could not have been unpredictable. Therefore, it cannot be said that a remedy was impracticable. The controlling inquiry is whether the state was in a position to provide for predeprivation process. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

Since the actions of the board member were in fact "state action" and part of the state system, the New Jersey Supreme Court should have found that the actions resulted from established state procedure, which was not random or unauthorized and should have been remedied prior to any deprivation.

Clearly, in this case, the state had full knowledge of the deprivations from the moment that the abusive board member began to speak at the first hearing. The board was in control over the following hearings. Therefore, the board was in a position prior to the ultimate determination in the case, to alleviate the deprivation and either disqualify the board member or otherwise regulate his apparent bias, which led to the deprivation of rights.

C. Where aggrieved parties such as petitioners do not have postdeprivation remedies, the State should be held accountable for its actions that caused a deprivation of due process rights.

Pursuant to the *Parrat* analysis, due process is afforded in a case of negligent deprivation of procedural due process rights only when an "adequate" postdeprivation remedy is available. Where no such remedy is available, the due process rights are violated and the state will be held accountable. Applying the decision below, the only relief available to a litigant who appeals from a board decision is to file an action in lieu of prerogative writs, which allows for the correction of governmental action but the litigant cannot obtain damages, attorneys fees or costs. *See Ballantyne House Assoc. v. Newark*, 269 N.J. Super. 322, 331 (App. Div. 1993); *O'Neill v. Washington Tp.*, 193 N.J. Super. 481, 486 (App. Div. 1984); *Ippolito v. Mayor of Hoboken*, 60 N.J. Super. 477, 488-489 (App. Div. 1960). This is an inadequate postdeprivation relief for manufactured housing communities throughout the nation.

A postdeprivation remedy will be found to be "inadequate" where "seeking redress through tort suit would probably be so lengthy and speculative process and even a successful suit would not vindicate entirely the employees' rights to be free from discriminatory treatment." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 266 (1982).

In finding that petitioners or any aggrieved party including NJMHA and MHI members in a similar situation, have adequate postdeprivation remedies available in the form of litigation, the New Jersey Supreme Court has not addressed the fact that this alleged "postdeprivation remedy" is speculative at best since on remand the case merely gets returned to the same board with the chance of bias arising yet again. Moreover, such actions may result in extreme delay and significant costs. These actions not only violate the due process rights of petitioners and other

NJMHA and MHI members, but threaten the continued existence of manufactured housing communities throughout the country. All community operators, not just those with the means to litigate are entitled to protection of their due process rights. Therefore, the Court must ensure that adequate remedies are available before sending aggrieved parties back to the whims of an uncontrolled and apparently presently uncontrollable board.

This Court must provide the limits of governmental behavior and provide a remedy with meaning when that guidance is not followed.

CONCLUSION

This case presents social and economic issues that will affect manufactured housing communities throughout the country. Defining the parameters of acceptable behavior on the part of public officials and addressing the abuse of power by government officials present issues of great public importance. A reversal of the New Jersey Supreme Court's decision is the appropriate manner in which to address these issues. The parameters of acceptable behavior on the part of public officials must be defined so that their power is not abused to deprive parties appearing before them of their constitutional rights.

Respectfully submitted,

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